has been confiscated by the Government of the Spanish Republic; and the Captain of said vessel should follow the instructions that officially he may receive from the corresponding Department.

Which I communicate to you for your knowledge and respective effects.

Yours very truly,

The Spanish Consul in
charge of the Consulate General
AMADOR SANCHEZ'

While at Rosario I presented myself to the Spanish Consul there and he noted on the ship's articles on October 26th, the fact that the ship was now the property of the Spanish Government. Later on October 28th, when I was at Buenos Aires a similar notation was made on the ship's official register by the Spanish Consul there.

I attach photostats of the ship's articles and the ship's register, showing these notations. Since arriving at New York I have presented myself to the Spanish Consul here and he has given me orders that the steamship 'Navemar' *is still to be held at the disposal of the Spanish Government.* With this letter I hand you a copy of the official letter which I have received from the Spanish Consul at New York" (Libelant's Exhibit 7; p. 39).

Prior to the writing of this letter, Martinez, master of the "Navemar", so far recognized the fact that he was acting for the Republic of Spain that he went to Luis Careaga, acting Consul General at New York, and received from him funds to cover wages and advances made by the master for account of the crew.

On receipt of the money he signed the following document:

> "Received from the Honorable Consul General of Spain in New York the amount of $300. as an advance to attend to the expenses of the vessel of my command.
>
> New York, December 2, 1936
>
> MANUEL MARTINEZ
> Master of the Steamer 'Navemar'."

(695).

Proceedings in the Courts Below.

On or about December 3, 1936, a dispute arose between the master of the "Navemar" and the committee* of the crew. After this dispute had arisen the master of the "Navemar", together with two members of the duly elected committee, proceeded to the office of the Consul General of Spain and submitted the dispute to the Spanish Consul in accordance with Article XXIII of the Treaty of Friendship and General Relations between Spain and the United States, 33 Statutes at Large (Part 2) 2105, which provides in part as follows:

> In case any disorder should happen on board of vessels of either party in the territorial waters of the other, neither the Federal, State or Municipal Authorities in the United States, nor the Authorities or Courts in Spain, shall on any pretext interfere, except when the said disorders are of such nature as to cause or be likely to cause

* Under the laws of the Republic of Spain (Exhibit 13) committees of the crew are authorized to deal with the master in respect to certain specified details relating to the operation of a Spanish vessel. The five named respondents constituted such a committee on the S. S. "Navemar".

> a breach of the peace or serious trouble in the port or on shore, or when in such trouble or breach of peace, a person or persons shall be implicated not forming a part of the crew. In any other case, said Federal, State or Municipal Authorities in the United States, or Authorities or Courts in Spain, shall not interfere, but shall render forcible aid to consular officers, when they may ask it, to search for, arrest and imprison all persons composing the crew, whom they may deem it necessary to confine.

Similar provisions are contained in the Foreign Relations Law, Title 22 U. S. C. A. Articles 256, *et seq.* Therefore, both by treaty and by the law of the United States, the Consul General of Spain had exclusive authority to investigate and determine this dispute between the master and crew of the "Navemar". No provision is made either in the treaty or in the laws of the United States for an appeal to or review by any of the courts of the United States. In fact the treaty specifically provides that the courts of this country shall in no event intervene in such matters unless requested to do so by the representative of the Republic of Spain.

The Consul General of Spain, after hearing both sides of the dispute, concluded that the actions of the committee of the crew were proper and hence entitled to his approval.

Shortly thereafter the master of the "Navemar", Martinez, was relieved of command of his vessel and another master, Tomas Pascual, was appointed by the Consul to take command of the "Navemar" (560).

Despite this determination of the dispute between the master and crew by the Consul, petitioner insti-

tuted an action in the United States District Court seeking, (to quote from p. 9 of the petition herein)

> "to oust from the vessel a group of men who had risen against the master and excluded him from any control over her."

See also libel at folios 19-23.

Process was issued *in rem* against the steamship and this process of the court which ostensibly was issued solely for the purpose of quelling disorder on board a foreign ship (a procedure authorized neither by law nor treaty), was used to oust the Republic of Spain from possession of a vessel, which possession the Spanish Government had obtained prior to the arrival of that vessel within the territorial waters of the United States.

The process was made returnable on December 9th, two days after the libel was filed, and hearings were held forthwith by the District Court. On the return day, the Consul General of Spain, Luis Careaga, appeared specially before the District Court "for the purpose of contesting the jurisdiction of the Court" (fol. 44). Later and before the conclusion of the hearing Mr. Careaga appeared in person and offered to state to the Court his reasons for objecting to the jurisdiction (149, 150) but the District Court refused to hear the Consul or his attorney, Mr. Rosenberg, and stated that they had no standing in the Court and might not be heard (341).

A final decree granting possession of the vessel to the libellant was thereupon entered.

In the meantime the Ambassador, Fernando de los Rios, had made representations to the Secretary of State of the United States. The Secretary of State replied that it was not the policy of this government

to intervene in such matters (fols. 388-389), whereupon the Ambassador authorized Jesse L. Rosenberg to act as attorney for him (see telegram, p. 359 of the record) in the Courts of the United States.

On December 16, 1936, counsel for the Ambassador procured an order to show cause why the default decree should not be set aside and process vacated (433-444). The District Court denied the application in an opinion dated December 31, 1936 (496-521), and an order was entered on this opinion on January 4, 1937.

On January 8, 1937, the Ambassador procured a second order to show cause why his default should not be opened and why he, as Ambassador of the Republic of Spain, should not be permitted to appear as claimant and for such other and further relief as to the court might seem just. By opinion dated January 28, 1937, this second application was denied, and an order was entered on this opinion on February 3, 1937.

The Ambassador thereupon appealed from the final decree in the possessory suit dated December 14, 1936, and from the decisions and orders of the District Court denying the first and second applications to intervene, dated respectively January 4, 1937, and February 3, 1937 (835-839). The libelant (petitioner in this Court) moved in the United States Circuit Court of Appeals for the Second Circuit to dismiss this appeal on February 15, 1937, and on March 4, 1937, the Circuit Court of Appeals entered an order allowing the appeal from the order denying the second application to intervene and dismissing the appeal from the final decree on default and from the order denying the first application to intervene.

In due course the appeal was argued and the order of the District Court denying the second application of the Ambassador to intervene was reversed by the Circuit Court with directions to the District Court to enter an order dismissing the libel for lack of jurisdiction.

I.

The Circuit Court of Appeals correctly decided that on the facts of this case, the libel should be dismissed for want of jurisdiction.

The libelant is a Spanish Corporation, all of whose stockholders and directors are citizens of the Republic of Spain; the "Navemar" is a Spanish vessel; the five respondents are Spanish citizens; the Republic of Spain itself claims title and the right to possession of the "Navemar".

In *The Belgenland,* 114 U. S. 355, 360, this Court said that in cases involving disputes between citizens of a foreign state, "on general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is a special reason for doing so, and will require the foreign consul to be notified, and though not absolutely bound by, will always pay due respect to his wishes as to taking jurisdiction".

Inasmuch as the District Court was taking jurisdiction of such a controversy without first notifying the Consul General of Spain and without inquiring as to his wishes as to taking jurisdiction, Luis Careaga, Acting Consul General of Spain, appeared specially "for the purpose of contesting jurisdiction of this Honorable Court" (fol. 44). The court on the insistence of counsel for the libelant, proceeded with

the hearing over this objection by the Consul General of Spain. Subsequently and before the conclusion of the hearing, Mr. Careaga appeared in person before the District Court and offered to consult with the court in Chambers (149-150). At the close of the hearing and before a decree had been entered, Mr. Rosenberg, appearing for Mr. Careaga, requested the courtesy of a hearing.

The District Court refused to "pay due respect to his wishes as to taking jurisdiction", and refused to hear the Consul or his attorney (341, 342).

Thereafter, the Ambassador sought to intervene as claimant of the "Navemar".

In *The Pesaro,* 255 U. S. 216, and in *Ex parte Muir,* 254 U. S. 522, this Court pointed out three permissible and adequate forms of procedure by which the question of jurisdiction could be raised. They are as follows:

First: If the foreign sovereign deems it inadvisable to appear in the courts of the United States, a diplomatic representation can be made to the Department of State to the end that the Attorney General will file a suggestion of immunity;

Second: The government itself, as of right, "is entitled to appear in the suit to propound its claim to the vessel and to raise the jurisdictional question";

Third: The accredited and recognized representative may appear and take the same steps in the foreign government's interests.

The first of these is purely diplomatic. The Ambassador, deeming the matter diplomatic rather than judicial, had addressed a note to the Secretary of

State and in due course had received the reply which appears at folios 388, 389 of the record.

Thereafter the Ambassador sought to appear as claimant of the ship in the manner prescribed by the court in *The Pesaro,* and *Ex parte Muir.*

The decision of the Circuit Court is not (as stated by petitioner herein) based on a mere suggestion by the Ambassador, but on the facts of this case, which the libelant itself put in evidence and which establish that, when the "Navemar" arrived at New York she was in the possession of the Republic of Spain and her official documents so indicated (Opinion, fol. 363).

In the *Santissima Trinidad,* 20 U. S. 283, at page 334, Mr. Justice Story said:

> "In general, the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is complete proof of her national character; a bill of sale is not required to be produced. Nor will the courts of a foreign country inquire into the means by which the Title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with his own supremacy. The commission therefore of a public ship when duly authorized, so far, at least, as foreign courts are concerned, imparts absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been settled practice between nations; and, as a rule founded in public convenience and policy, cannot be broken in upon, without endangering the peace and repose, as well of neutral, as of belligerent sovereigns."

Both the District Court at page 267 and the Circuit Court at page 336 have found that all the necessary proofs are before the Court. The Circuit Court, disagreeing with the District Court, has found as a matter of law, that on these proofs it has been established beyond question that the "Navemar", at the time of her arrival in United States waters, was in the actual possession of the Republic of Spain. Hence, since the property of a sovereign is immune from process in the courts of another sovereign, the Circuit Court directed that the libel be dismissed for lack of jurisdiction.

II.

Whether or not constructive possession is sufficient to permit a foreign sovereign to claim immunity for a vessel is not an issue in this case for the reason that the Circuit Court of Appeals has specifically found that the Republic of Spain had actual possession of the "Navemar".

The Circuit Court of Appeals, after deciding that, on the facts of this case, constructive possession of the "Navemar" for the purpose of immunity would be as efficacious as actual possession asserted through the Government's own officers, said:

> "Moreover, we have here as evidence of possession and control first that, while at Buenos Aires, the master placed himself 'at the disposal of the Spanish Consul' pursuant to direct instructions by the Spanish Government; second, that the Consuls at Buenos Aires and Rosario made endorsements on the ship's registry and roll of which the master was aware and which claimed the 'Navemar' as property of the Spanish Gov-

ernment; third, that the master on December 7, 1936, advised the former owners of the vessel that on October 28, 1936 the Spanish Government had obtained possession of the 'Navemar' and that since that date he had been 'generally under orders of the Spanish Government' as given him by the Consul at Buenos Aires; fourth, that on December 2, 1936, the master signed a receipt acknowledging that the Spanish Consul in New York had given him $300. as an advance to attend to the expenses of the vessel."

In *The Roseric,* 254 Fed. 154, 160 (D. C. N. J.), the Court, after discussing the effect of the presence of the owner's crew on a vessel after requisition by the British Government, said:

"The contention of libelant that, as the ship's officers and crew operated the 'Roseric', she was within the exception established by these cases, is not tenable. The British government, in the exercise of its sovereign powers, took the 'Roseric' and devoted it to its own purposes. That no change in the officers and crew took place, and that they continued in the employment of the ship's owner, is unimportant. The ship, its owner, officers, and crew, were under the compulsion of sovereignty.

* * * Whether the government should operate the ship by the owner's officers and crew or others was for the sovereign's exclusive determination.

The effect of its requisition was to put the ship and its equipment into the public service. The officers and crew, as well as the ship, for the time being became the sovereign's instrumentalities, and whatever possession of the ship they obtained by reason of this employment was the sovereign's possession while the requisition was in force.

> In legal effect a ship so subjected to *vis major* is no less in the possession of the sovereign than if he had taken it over by a regular charter or had manned it by his navy."

So, too, in Hyde, International Law, Volume I, page 445:

> "In such case the dedication of the ship to public service would seem to render the constructive possession of the sovereign as efficacious for purposes of exemption as actual possession manifested by the assertion of control through the medium of its own officers."

See also:

The Adriatic, 258 Fed. 902 (C. C. A. 3).

The statement by petitioner that the decision of the Circuit Court of Appeals in respect to possession is in conflict with the decision of this Court in *The Davis,* 10 Wall. 15, is incorrect and the incomplete quotation from that decision is misleading. We shall quote from *The Davis,* at page 21, and shall italicize so much of the quotation as has been omitted in the petitioner's brief.

> "But what shall constitute a possession which, in reference to this matter, protects the goods from the process of the Court? The possession which would do this must be actual possession, and not that mere constructive possession which is very often implied by reason of ownership under circumstances favorable to such implication. *We are speaking now of a possession which can only be changed under process of the court by bringing the officer of the court into collision with the officer of the government, if the latter*

should choose to resist. The possession of the government can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession. This, we think, is a sufficiently liberal definition of the possession of property by the government to prevent any unseemly conflict between the court and the other departments of the government, and which is consistent with the principle which exempts the government from suit and its possession from disturbance by virtue of judicial process."

III.

The decision of the Circuit Court of Appeals with respect to the effect of a decree of confiscation is not contrary to international law.

Under Point III of the Petition at page 29, proctors for the petitioner state that the decision of the Circuit Court of Appeals to the effect "that a decree of confiscation is effective when the property confiscated is entirely outside of the territorial limits and jurisdiction of the confiscating power, and in the possession of its owner, is without precedent". We respectfully submit that no such broad and comprehensive postulate has been made by the Circuit Court and that the construction which counsel have placed upon the decision below is incorrect.

The controversy neither warrants nor invites a conclusion so untenable and we are concerned merely with the effect of a sovereign decree upon a vessel owned and operated by citizens of that sovereign state. There can be no question about the right of a

sovereign to requisition ships of the flag and such requisition can be made effective not only on the high seas, but also in the waters of another state.

In this view of the case the Circuit Court stated at page 7 of the opinion:

> "One of the first principles recognized in the rudimentary body of international law since the Middle Ages to our day is that a vessel is considered, constructively at least, as part of the territory of the sovereign whose flag it flies and is subject, while on the high seas, or in foreign territorial waters, to the jurisdiction of that sovereign. *U. S.* v. *Rodgers,* 150 U. S. 249; *The Scotland,* 105 U. S. 27; *Wilson* v. *McNamee,* 102 U. S. 574; *Crapo* v. *Kelly,* 83 U. S. 610; *E. B. Ward Jr.,* 17 Fed. 456 (C. C. La.)."

The Circuit Court has found, therefore, not that the "Navemar" was "entirely outside of the territorial limits" of the Republic of Spain, but that the vessel was itself for purposes of sovereign jurisdiction a part of the territory of Spain, for as stated by Wheaton on International Law: "Every state claims to exercise jurisdiction over its own merchant vessels wherever they are and even when they are in the waters of another state."

In *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, this Court had for consideration the effect of the National Prohibition Act in respect to vessels under the United States flag. The act, by its terms, was limited in operation to the territory and territorial waters of the United States. After deciding that the operation of the act by its terms was limited to the territorial waters, the Court said, at page 129:

> "In so saying we do not mean to imply that

> Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long has been settled that Congress does have such power over them." *Lord* v. *Goodall, N. & P. S. S. Co.,* 102 U. S. 541, 26 L. ed. 224; *The Abbey Dodge,* 223 U. S. 166, 176, 56 L. ed. 390, 393, 32 Sup. Ct. Rep. 310.

Professor Holdsworth in an article entitled "The Power of the Crown to Requisition British Ships in a National Emergency", appearing in Vol. 35 of the Law Quarterly Review, states that this result is based on the theory of allegiance and reaches the following conclusion after a careful review of the authorities:

> "It follows, therefore, that the prerogative of the Crown to requisition a British ship is not ousted merely because she is in a foreign port. Unless the authorities of the foreign country intervene, the owners of such a ship must obey the requisition, and act illegally if they do not."

This authority recognizes the inherent power of a foreign sovereign to intervene but it is well established that a foreign state will take jurisdiction of the vessel of another only when the vessel itself has done a wrong, for as the Court said in *Rex* v. *Lesley* (1860), 29 L. J. M. C. at page 101:

> "Although an English ship in some respects carries with it the laws of her country in the territorial waters of a foreign state, yet in other respects it is subject to the laws of that state as to acts done to the subjects thereof."

See also *The Queen* v. *Anderson* (1868), L. R., 1 Q. C. R. at page 165.

To the same effect Mr. Justice Sutherland in *U. S.* v. *Belmont,* 81 Law Ed. 715, at page 719, said:

> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

The cases cited by the petitioner, such as *The Jupiter No. 3* (1927) Probate 122, and *Martiarena* v. *Amaliobeta* in the civil court at Antwerp, printed as an appendix to petitioner's brief, are not in point. The issues in both were between private litigants, in which the question of sovereign immunity from jurisdiction was not involved, and the decisions thereunder are not in conflict with the principles enunciated by the Circuit Court of Appeals and supported by the applicable decisions of this country in *Oetjen* v. *Central Leather Co.,* 246 U. S. 297; *Ricaud* v. *American Metal Co.,* 246 U. S. 304; *The Adriatic,* 258 Fed. 902 (C. C. A. 3).

IV.

The issue before the Circuit Court was judicial; it did not rest upon diplomatic representation and was properly presented.

Throughout the petition and brief, proctors for the petitioner have endeavored to create the impression that there has been in this case a delegation of diplomatic functions and duties by the Ambassador to

Luis Careaga. For example, at the bottom of page 31 it is stated that "Careaga filed a certificate stating that a Power of Attorney, clothing him with diplomatic power to act for the Republic of Spain in the matter of claiming the S. S. 'Navemar' was lodged in the Embassy of Spain at Washington". This statement is not in accordance with the facts and is most misleading. The Power of Attorney speaks for itself and a translation of this Power of Attorney will be found at page 363 of the Record. The Ambassador had acted in a diplomatic capacity only when he made representations to the Secretary of State of the United States. When the Secretary of State advised the Ambassador that it is not the practice of the State Department to take any action which might constitute an interference by the executive authorities of this Government with regard to the merits of a controversy and that the Spanish Government had the right "to appear directly before the Court in a case of this character", the Ambassador, without waiving any of his privileges and immunities, petitioned the Court for leave to file claim to the "Navemar" (p. 179). In other words, the Ambassador was seeking to become a party to the litigation and "to propound his claim to the vessel and to raise the jurisdictional question". *Ex Parte Muir,* 254 U. S. 522. Obviously the Ambassador, just as any other litigant, not only was entitled to employ counsel to represent him but to delegate to others the purely ministerial acts which of necessity had to be performed in order to present his claim to the "Navemar" before the Courts of the United States.

We submit that since the instant case is between a friendly foreign sovereign and a private Spanish litigant who, by invoking judicial process of the United States, sought to secure possession of a Spanish vessel,

the procedure was judicial and the manner in which the Ambassador appeared was in conformity with *Ex Parte Muir*. We further submit that the cases cited by petitioner under Point IV of petitioner's brief, which cases involved diplomatic representations between the political branches of two governments, have no bearing on the issues now before the Court.

Conclusion.

All of petitioner's arguments overlook the findings of fact of the Courts below which were based on the evidence adduced by the libelant (Petitioner herein). These facts are summarized in the opinion of the Circuit Court of Appeals.

We respectfully submit that, on these facts and for the reasons outlined in the foregoing brief, the application for a writ of certiorari should be denied.

Dated, New York, N. Y., August 28, 1937.

ANTHONY V. LYNCH, JR.,
CHARLES W. HAGEN,
HORACE T. ATKINS,
Proctors for Respondent, Fernando de los Rios, Spanish Ambassador to the United States of America.

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 242.

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., Owner of the Spanish Steamship "NAVEMAR",

Petitioner,

—against—

Spanish Steamship "NAVEMAR", her engines, etc., and RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ and ANTONIO SANCHEZ,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, Ambassador of the Republic of Spain, appellant,

Respondent in this Court.

BRIEF FOR RESPONDENT.

CHARLES W. HAGEN,
HORACE T. ATKINS,
JESSE L. ROSENBERG,
JOHN S. BULL,
Counsel for Respondent.